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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers	)	CC Docket No. 96-238
Accelerated Docket for Complaint Proceedings	)	DA 97-2178

COMMENTS OF
ICG TELECOM GROUP, INC.

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ICG Telecom Group, Inc. ("ICG") hereby submits its comments in response to the Public Notice (DA 97-2178, rel. Dec. 12, 1997) ("Notice") in the above referenced matter. ICG is the second largest "facilities-based" competitive local exchange carrier ("CLEC") that is not affiliated with a major interexchange company. ICG participated in the earlier phases of this proceeding, submitting both comments and reply comments.

ICG's experience in its business relationships with incumbent local exchange carriers ("ILECs'") validates the need for a quick, efficient complaint resolution process for disputes between ILECs and interconnecting competitive local exchange carriers ("CLECs"). The ILECs have repeatedly resorted to obstructionist tactics in implementing interconnection agreements negotiated pursuant to Sections 251 and 252 of the Communications Act, as amended 47 USC §§ 251, 252. ICG recognizes that the United

States Court of Appeals for the Eighth Circuit[1] has constricted the Commission's authority to review complaints arising directly out of the implementation and interpretation of interconnection agreements and to review certain pricing decisions.[2] The Commission nonetheless still retains wide discretion in all other areas. For example, the Commission has wide discretion to resolve whether particular facilities, such as building riser cables are unbundled elements or are available to CLECs under the Commission's inside wire policies.

ICG sets forth below its comments on the particular issues on which comment was requested in the Notice. In general, ICG enthusiastically endorses the concept of an accelerated procedure, with an opportunity for a hearing, to resolve disputes. The Accelerated Docket is a necessary supplement to the recently adopted rules[3] and should be adopted on an accelerated basis.

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[1] Iowa Utilities Board v. F.C.C., 120 F.3d 753, amended, on reh., U.S. App. LEXIS 28652 (8th Cir. 1997) cert. pending sub nom. FCC v. Iowa Utilities Board, et al., filed November 17, 1997 (1997-98 term).

[2] With further revisiting of the issues addressed by the Court of Appeals in Iowa Utilities Board a distinct possibility, the Commission should act now to develop rules and procedures that will enable the Commission to act quickly in these areas as well should its jurisdiction be restored.

[3] Amendment of Rules to Be Followed When Formal Complaints are Filed Against Common Carriers, CC Dkt. No. 96-238, FCC 97-396 (rel. November 25, 1997) ("Complaint Order").

1. Need for Accelerated Docket

There is a clear need for the Accelerated Docket. While many issues will involve specific interpretation of interconnection agreements, and the Commission is at present arguably precluded from entertaining such complaints by the decision in Iowa Utilities Board,[4] many of these interpretative questions often directly involve federal issues. For example, at least one LEC is requiring, under the guise of interpreting agreements, interconnecting CLECs to locate their *switch* (as opposed to even an interconnecting point of presence ("POP")) within the local calling area of the wire center through which the CLEC interconnects using entrance facilities, even though whether the entrance facilities terminate in a multiplexer in a POP (which then carries the transmission to a switch located many miles away that serves multiple local calling areas) is utterly transparent to the ILEC servicing wire center. The Commission could entertain the issue of whether, under the Act, it is discriminatory or unreasonable practice to in these circumstances require a CLEC to configure its network in such an inefficient manner. Addressing issues of this sort would not only resolve disputes in a timely manner; it is also consistent with the Notices' intent to have the Accelerated Docket address a broader range of issues. Id. at ¶ 2. And it is consistent with a proper division of responsibilities between the states and the Commission, allowing the Commission to implement policy on a consistent nationwide basis while allowing the states to adjudicate disputes over language in particular agreements.

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[4] See discussion accompanying note 1, supra.

2. Minitrials

The Notice proposes to allocate time equally to each party to present its case and cross examine witnesses. According to the Notice, the Commission's new complaint pleading requirements and procedures, which place significant new burdens on complainants, will apply to Accelerated Docket proceedings. For this reason, the complainant should be allotted more time than the defendant for presenting evidence and witnesses at the hearing. It is the complainant that will have to lay out the basic facts and establish the framework of the complaint. A "60-40" allocation of time seems reasonable as a prima facie allotment for presenting evidence.

The Commission should not set any time limit for presentation of the case at this time. Until there is some experience, setting time limits is premature. The Commission may want to consider allowing the Task Force to set time limits on a case-by-case basis after the initial status conference. However, the staff should not attempt to set time limits too early in the process, and should probably only do so at a status conference held no sooner than two weeks and no later than one week prior to the hearing.

So that the defendant can fairly prepare, the complainant should notify the defendant at least fifteen days prior to the hearing how much time the complainant intends to use. It does seem reasonable to allocate each party the same amount of time for cross examination.

3. Discovery

The Notice correctly notes that it will be difficult to have a protracted discovery process given the compressed time frame for the entire proceeding. Accordingly, the Commission should require that all documents relevant to the dispute, and certainly all documents in the Information Designation, be produced at the time the complaint and answer are each filed. Attempts to carve out only a subset of these documents, such as those "likely to bear significantly on any claim or defense," is likely to engender disputes and delay.

The proposal to require parties to submit all discovery disputes at the time of the initial status conference seems reasonable. There must also be the flexibility for additional status conferences and the possibility of additional limited discovery should it be necessitated by developments.

Sanctions are entirely appropriate for parties failing to make discovery. Traditional sanctions should be employed, including adverse findings on both specific issues and general issues with respect to which a party fails to make timely and full discovery.

4. Pre-Filing Procedures

The Notice asks whether Parties should be required to have engaged in informal settlement efforts under the auspices of the Task Force as a condition of acceptance into the Accelerated Docket. Notice at ¶ 4. As the Notice observes (id.), the Commission's recently adopted rules already require that the parties engage in settlement discussions prior

to filing a complaint. Further advance requirements are entirely unwarranted and would severely diminish the value of the Accelerated Docket. By imposing an additional requirement, the Commission will impose additional delay. The idea of the Accelerated Docket is to expedite matters; it defeats this purpose if the Accelerated Docket becomes almost as protracted as the complaint process. Parties who otherwise are in a settlement mode will not be dissuaded from settling because there is a complaint pending. Further, the filing of a complaint does not necessarily terminate settlement possibilities. And as the Notice correctly observes, avoiding a requirement that the parties have pre-complaint settlement discussions with the Task Force as a participant avoids potential ex parte issues and issues of how to handle proprietary information. Id. at ¶ 4.

A direct inquiry into what settlement discussions have occurred can be, perhaps should be, one of the agenda items at each status conference. While the Commission should also continue to rely on the general rule that offers of settlement are for settlement purposes only and not formally admissible as evidence, the presiding staff should inquire at the status conference(s) into the tenor of settlement discussions and what transpired at settlement discussions. This will not only facilitate settlement but will help the staff learn more about the context and substance of the dispute and understand its parameters.

Further, nothing in the rules should prevent the parties, without staff's participation and without any inquiry by the staff, from agreeing voluntarily to have, and thereafter jointly requesting, staff mediation in some manner, either pre-complaint or post-complaint. By making the process of reaching agreement or failing to reach

agreement to have staff participate in mediation efforts entirely "extra record", without participation by staff or any staff knowledge of which party may have requested or rejected mediation and why, the Commission would eliminate any prejudice to a party who believes further negotiation would be futile. All the staff would know about this aspect of the proceeding is that the parties either did or did not request staff involvement in settlement efforts.

Either party should be able to initiate a request to transfer a pending complaint to the Accelerated Docket, but absent mutual consent, the staff should rule as to whether the transfer will be granted. The parties in pending matters are already involved in a course of litigation around which planning is occurring. If a party can show good cause why a matter should not be transferred or why it would be prejudicial to transfer a pending matter, it should not be transferred.

For reasons similar to those supporting mutual consent for transfer of a pending matter, Defendants should not be able to seek to have a complaint filed under the more general procedures included in an Accelerated Docket. Litigation is not lightly undertaken. A party undertaking litigation, with all its attendant uncertainties, usually does so with specific resource constraints, including timing, in mind. The defendant should not be able to shift the timetable as a litigation tactic to pressure the complainant.

5. Pleading Requirements

Answers should be required within seven days of the filing of a complaint in the Accelerated Docket. However, in fairness to defendants, and to allow defendants to fairly

prepare, complainants should be required to notify the defendant as soon as complainant's counsel, outside or in-house, has a "client ready" draft. As an alternative and "safe harbor," notification should be required no less than three business days prior to filing the complaint.[5] Waivers of the advance notification requirement should be available, such as where a matter has emergency aspects to it or immediate relief is otherwise required. But given the existing requirement of pre-filing discussions, the requirement of advance notification that a complaint will be filed should not be overly burdensome.

7. **Damages**

ICG does not believe it is necessary to limit Accelerated Docket proceedings to cases where the damages issue is bifurcated. In any event, as with complaints under the Commission's regular procedures, the Commission should, in order not to discourage complainants from using the Accelerated Docket, require that all damage proceedings be resolved within the same number of days it took to resolve the underlying complaint.

9. **Commission Review**

In cases where a Commission order is required by the statute within 90 days, the parties should be prepared for an accelerated and abbreviated review process by the Commission. The proposals advanced in the Notice seem reasonable. To expedite review, the Commission may want to consider allowing a panel of Commissioners to take final

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[5] Beyond the minimum of three days, the notification would be approximate. If the filing took place four or five days or even a week after notification it would suffice, so long as the defendant had been kept informed.

action for the Commission. See Sections 0.212, 0218, 47 C.F.R. §§ 0.212, 0218. Further review would be available but would not be required as a condition of judicial review.

CONCLUSION

ICG commends the Task Force for its initiative in instituting this proceeding. ICG requests that the Commission take action in accordance with the foregoing comments.

Dated: January 13, 1998

Respectfully submitted,

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